STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Greenville County
Honorable Robin B. Stillwell, Circuit Court Judge

THE STATE,

Respondent,

vs.

ONTARIO STEFON PATRICK MAKINS,

Appellant.

Appellate Case No. 2016-002495

INITIAL BRIEF OF RESPONDENT

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STATEMENT OF THE CASE

Appellant Makins was indicted for criminal sexual conduct with a minor in the first degree, criminal sexual conduct with a minor in the third degree, and lewd act on a minor. Following trial on December 5-8, 2016, a jury found Makins guilty of criminal sexual conduct with a minor in the third degree. During sentencing, Makins apologized to Victim's mother. Tr. p. 436. The Honorable Robin B. Stilwell sentenced Makins to ten years imprisonment.

STATEMENT OF FACTS

Appellant Makins molested his wife's younger sister from the time she was five to eight years old. Victim disclosed the abuse to her second grade teacher, Mary Jill Kroske, roughly a week after a representative from the Julie Valentine Center spoke with the class about inappropriate touching. Tr. p. 158. On March 20, 2015, the children left for recess, but Victim lagged behind and said, "Ms. Kroske, do you remember those ladies that came to us?" and Kroske answered, "yes." Victim replied, "well that happened to me." Tr. p. 159, lines 4-11. Victim disclosed she was sexually abused to Kroske. Tr. p. 159. Kroske went to the guidance counselor to report the abuse. Tr. pp. 159-60.

Victim's Mother testified Victim was ten years old at the time of trial. Mother has four daughters, including Victim, aged twenty-nine to ten years old. At the time of trial, daughter Toi was nearly twenty years old. Makins is Toi's boyfriend, and they have two children together – M.M. (age 9) and C.M. (age 6). Tr. pp. 193-95; p. 197. Mother testified she was close to Makins before the disclosure: Toi and Makins were together since they were in middle school, and Mother loved Makins and considered him a son. Makins spent a lot of time with the family. Tr. pp. 197. Sometimes Makins babysat Victim. Tr. p. 200.

The school called Mother and advised her Victim told her teacher her "brother" sexually abused her. Mother did not believe it at first, because "brother" meant Makins and she did not believe Makins would do that. However, when she went to school and spoke to Victim, she implored Victim, "Tell the truth," and Victim replied "I am." Tr. p. 203.

Mother testified at the time Victim acted out a lot. She would check on Victim in her room at

night and see Victim with her hands in her panties. Victim wet the bed a lot. She became adamant at times about not wanting to go to Toi's apartment. Tr. pp. 203-04.[1] After the disclosure, Mother took Victim to the Julie Valentine Center for a forensic interview and took her to counseling. She testified Victim had trouble focusing, behaving in school, and sleeping at night. Tr. pp. 204-05. Mother and Victim no longer interacted with Makins and did not have regular contact with Toi or the grandsons. Tr. pp. 206-08.

Victim testified she went to Toi's house often. Sometimes Makins watched Victim when Toi was at work. Tr. pp. 222-23. She testified one time, she was playing with her nephews and they threw cups of water at each other in the bathroom. Makins called them into the living room, one at a time, to punish them. He called Victim and told her to suck his penis. Tr. p. 225. She testified she was made to perform oral sex on other occasions, more times than she could remember. Tr. pp. 225-26. Makins also touched her "butt" and made Victim touch his penis. Tr. pp. 227-29. This sometimes happened while the nephews were outside but also happened when the nephews were playing video games. Sometimes the nephews were in the same room. Tr. pp. 231-32. Victim found she wanted to leave Toi's as soon as she arrived and would call her mother to go home. Tr. p. 233.

She testified she told her teacher, Ms. Kroske, about the abuse. Tr. p. 234. She admitted she previously lied when she said Makins threatened not to tell, but explained she lied because she was previously scared to tell about the abuse. Tr. pp. 242-43; pp. 245-46. She testified she misses Toi

[1] Makins erroneously claims Mother testified Victim became adamant about not going to Toi's house **before** the abuse occurred. Br. of App. p. 13. Mother testified Victim's protestations occurred when Victim was between five and eight years old, **during** the time period Makins abused her. Tr. p. 204.

and her nephews, but she told because "[Makins] is a child molester." Tr. pp. 234-35. She explained a child molester is a person who touches children on their private parts. Tr. p. 237. She testified she drew a picture of herself and Makins during threrapy. Tr. p. 236.

Investigator David Piccone interviewed Victim, then referred her to the Julie Valentine Center. He also interviewed Makins, who denied committing any sexual abuse, but admitted he sometimes was alone with Victim when he babysat her. Tr. pp. 253-54; pp. 259-60.

Christine Carlberg from the Julie Valentine Center conducted a forensic interview during which Victim described being sexually abused by Makins. The video recording of the interview was admitted as State's Exhibit Number Two. Tr. pp. 278-82.

During the interview, the Victim was clearly reluctant to talk about the abuse. She was visibly angry and sometimes grunted responses to the interviewer's questions. When asked a general question if anything happened, she replied "no" and later said she did not want to talk about it. State's Exhibit No 2 (8:30-9:30). Victim complained she wanted to go home. She slumped over on her chair – her body language would continue to be telling throughout the interview. She told the interviewer she told her mother and teacher, but she did not want to tell the interviewer what she told them. (9:30-10:30). Victim later said she was worried about Terry and was scared to tell. (11:00-11:30). She then indicated by shaking her head in agreement that she was abused, and she told the interviewer it occurred more than one time. (12:00-13:00). She held up five fingers to answer the question of what age the abuse began and indicated by showing eight fingers that the abuse lasted until she was eight years old. (circa 13:00). The abuse occurred at Toi's house. Victim asked the interviewer if Terry got arrested. She angrily exclaimed, "You already know, don't you" as an

answer to either her question or the interviewer's question about what happened. Victim pushed her chair to the edge of the room as the interviewer continued the inquiry on the difficult topic. (13:00-14:30). She slumped out of the chair onto the floor as she faced more questions. (16:00). She told the interviewer Terry is mean, Terry is scary, and he is a child molester. (17:00-17:15). She described a child molester as someone who touches a child in the private parts of their body. (17:30-17:45). Victim indicated, by pointing, that Terry did that to her. She said it occurred more than one time. (circa 18:00). Victim angrily said it felt scary. (18:45-19:00). Terri told her not to tell anyone. (21:00). She told the interviewer he also made her touch his rear. (25:00-25:30). Victim told the interviewer the abuse occurred every time she was at Toi's house. She told the interviewer he made her touch him with his pants pulled down, and threatened to kill her or her family if she told. (30:00-31:30). The interviewer suggested she draw while the interviewer briefly left the room. She drew a picture and said "Devil." (34:00-36:00). She later identified the person she drew as Terry. (39:00-39:15). At the end of the interview, Victim appears relieved and unburdened.

Kristen Rich, a licensed counselor, treated Victim. Tr. p. 295. She is certified in trauma focused cognitive behavioral therapy. She defined trauma as an event of a shocking nature that "tragically shifts your life." Tr. p. 293, lines 11-20. She testified she saw children suffering trauma from a number of events, including car accidents, physical or sexual abuse, witnessing a traumatic or violent death, robberies, and house fires. Tr. pp. 293-94.

She noted often children are suffering symptoms and they do not know why. She notes that first, she provides information about trauma so patients may understand what is happening to them. She utilizes tools so they can understand their emotions. The "most important part of trauma

[treatement] is to talk about what happened." Tr. p. 294, lines 8-23. Rich testified she has treated about 500 children, of which about 125 to 150 suffered trauma from sexual abuse. Tr. pp. 298-99.

Rich testified some of the symptoms a child might exhibit after suffering trauma are avoidance, hyperviligence, sleep problems, and somatic symptoms. Tr. pp. 301-02. They may suffer from intrusive thoughts or feel shame. Symptoms often overlap. Tr. pp. 302-03.

She further testified about delayed disclosure. Rich noted most children will delay disclosure because of their youth. If the perpetrator is a family member, delayed disclosure is more likely. Rich explained that disclosure is not an event, but more of a process. This process is known as piecemeal disclosure. Tr. pp. 304-05.

Rich testified she treated Victim. Victim disclosed she was abused during a therapy session. Tr. p. 325. Victim drew a picture in therapy which was admitted as State's Exhibit Number Four.

ARGUMENT

I.

The trial court did not err in declining to allow evidence Victim disclosed being abused by other children pursuant to State v. Boiter, 302 S.C. 381, 396 S.E.2d 364 (1990), because Appellant abandoned his motion to admit the evidence and failed to offer any proof the allegations were false. (Appellant's issues I & II).

Makins complains his due process rights were violated because he was not allowed to put into evidence that Victim made a "false" accusation that other children sexually assaulted her, relying on State v. Boiter, 302 S.C. 381, 396 S.E.2d 364 (1990). However, Makins' counsel aborted the in camera hearing and conceded he would be unable to establish the predicate requirement for admissibility. Makins' counsel offered no proof the allegations were actually false. Accordingly, the issue is not preserved for review, and the trial court did not err in declining to admit the evidence after counsel conceded the issue.

In Boiter, the Supreme Court found evidence of prior false accusations by the victim may be probative on the issue of credibility, but noted other jurisdictions require a threshold determination the prior accusation was false. Id. at 383, 396 S.E.2d at 365. The Supreme Court held in "deciding the admissibility of evidence of a victim's prior accusation, the trial judge should first determine whether such accusation was false." Id. If finding the accusation was false, the trial court should consider the remoteness in time and consider the factual similarity between the prior and present allegations to determine relevancy. Id.

Boiter's victim, his seventeen-year old stepdaughter, testified in camera she told her mother and a social worker she was fondled by her biological father at age eight. No investigation or further

inquiry was conducted as a result of her complaint. Applying the facts in Boiter to the Supreme Court's announced standard, the Supreme Court held, "Based upon the record in this case, the previous accusation was not investigated. **The defense presented no evidence to establish its falsity.**" Id. at 384, 396 S.E.2d at 365 (emphasis added).

In the instant case, Makins requested a hearing pursuant to Boiter. Victim then testified in camera she was touched inappropriately by M.S., Victim's oldest sister's daughter. She testified she told her mother. She did not tell her therapist, Kristen Rich, about the incident – only her mother told Rich. Victim was not sure, but thought she remembered telling officers. Tr. pp. 121-25. Defense counsel asked Victim whether she accused M.M. and C.M. of touching her inappropriately. She did not want to talk about it, but she confirmed they sexually abused her, although due to defense counsel's unartful questions, the exact nature of the abuse was not definitively established. The record does not support Makins' claim Victim "was adamant that the two young boys sodomized her when testifying at trial." Br. of App. p. 10. The abuse occurred at Toi's home. Victim told her mother, and said she "maybe" told Rich. Tr. pp. 125-28.[2]

After Victim testified, Makins' counsel announced he was not calling any more witnesses. Counsel explained:

> It appears that the burden is on the defense to first prove that the allegation made by the reported victim was false. . . .
>
> As the Court has heard, [Victim] has testified these allegations did occur. Whether I believe that or no, it becomes an impossibility, even though I have the children here available to testify that – with denial of these allegations, I think it becomes a factual impossibility

[2] No evidence was presented Victim disclosed abuse by M.S. to Rich. Further, no evidence was presented Victim disclosed to Rich that "C.M. and M.M. forced Victim to have anal sex with them." Br. of App. p. 10. Makins' citation in his brief does not support this claim.

> to prove the allegations false when there are no witnesses, there is no physical evidence, there are no reports that police – there was no investigation. At best what I'm going to have is a swearing contest.
>
> . . . [E]ven if the standard is preponderance of evidence, I don't know [how] I get past fifty percent to fifty-one percent. Rather than putting three minor children witnesses up, when I do not believe that I can establish to the Court even to a preponderance of the evidence that the allegations are false – because it would be a straight forward swearing contest. One will say yes, they did it. And they'll say, "no, I didn't." That's all the testimony we will have.
>
> I have discussed it with my client, of course, that if we stop at this point the allegations, the other allegations made will not come out before the jury. They will not be aware of these allegations, whether they are true or false, that no testimony about that would be admissible. So my client understands that and that is all the testimony that I would have.

Tr. p. 135, line 6 – p. 136, line 20.

The trial court asked if the prosecutor wished to respond, and the prosecutor replied, "I don't believe it's necessary so long as [defense counsel] has conceded that these allegations would be absolutely inappropriate at trial." Tr. p. 136, line 24 – p. 137, line 2. The prosecutor noted the Boiter standard was not met because the allegations were not proven false. Further, the prosecutor explained the State's view that the allegations were not factually similar to the instant crime and so the other allegations would not be admissible at trial. Tr. pp. 136-37.

The trial court agreed defense counsel's presentation was insufficient to establish admissibility under Boiter. The trial court remonstrated the burden suggested in Boiter was "an unwieldy burden" and questioned whether it was fair. The trial court suggested Supreme Court review of the question would be useful. However, the trial court held the evidence was inadmissible. Tr. pp. 137-38.

Makins' counsel did not argue Boiter applied an unconstitutional standard or Boiter required

more than a preponderance of evidence to admit evidence of false accusations. State v. Powers, 331 S.C. 37, 501 S.E.2d 116 (1998) (holding failure to raise constitutional issue at trial precluded its consideration on appeal). Makins' counsel only admitted his offer of proof would fail even under the preponderance standard, and he abandoned the motion.

The issue is not preserved for review because counsel conceded he could not present sufficient evidence to meet the Boiter standard and abandoned the motion. "[I]t is the responsibility of trial counsel to preserve issues for appellate review." Jackson v. Speed, 326 S.C. 289, 486 S.E.2d 750, 759 (1997). Mere observations by the trial court do not enlarge the grounds upon which the motion is made. Mize v. Blue Ridge Ry. Co., 219 S.C. 119, 64 S.E.2d 253 (1951). An issue conceded in trial court is not preserved for review. State v. Benton, 338 S.C. 151, 526 S.E.2d 228 (2000) (appellant barred from arguing a palm print was circumstantial evidence when he conceded at trial that it was direct evidence); State v. Brannon, 347 S.C. 85, 89, 552 S.E.2d 773, 775 (Ct. App. 2001) (finding search issue as to co-appellant Mayberry not preserved since Mayberry conceded at trial he had no standing to contest admission of evidence); Ex parte McMillan, 319 S.C. 331, 334, 461 S.E.2d 43, 45 (1995) (holding a party cannot acquiesce to an issue at trial, but then complain on appeal); see Ligon v. Norris, 371 S.C. 625, 634, 640 S.E.2d 467, 472 (Ct. App. 2006) ("An objection withdrawn at trial constitutes an express waiver of the issue and does not preserve the issue for appellate review."). "A litigant cannot concede an issue at trial and then raise it on appeal." CFRE, LLC v. Greenville County Assessor, 395 S.C. 67, 81, 716 S.E.2d 877, 885 (2011).

Further, counsel failed to make a sufficient record of the evidence that would be presented for this Court to review. Failure to make an offer of proof precludes consideration of an issue on appeal.

State v. Cabbagestalk, 281 S.C. 35, 36, 314 S.E.2d 10, 11 (1984). The appellant bears the burden of presenting an adequate record that is sufficiently complete so the appellate court is able to review the lower court's actions. State v. Knighton, 334 S.C. 125, 136, 512 S.E.2d 117, 123 (Ct. App. 1999). The reviewing court may not consider alleged error in excluding testimony unless the record fairly shows what the rejected testimony would have been. State v. Roper, 274 S.C. 14, 20, 260 S.E.2d 705, 708 (1979). Counsel's claim the two children would deny abusing Victim does not constitute evidence that they would deny abusing Victim. Bowers v. Bowers, 304 S.C. 65, 68, 403 S.E.2d 127, 129 (Ct. App. 1991) ("Arguments of counsel are . . . not evidence."); Shinn v. Kreul, 311 S.C. 94, 102, 427 S.E.2d 695, 700 (Ct. App. 1993) ("A court cannot consider facts appearing only in argument of counsel.").

Moreover, Makins' claim the prosecution did not object to defense counsel's "proffer" is simply misleading because the "proffer" was merely part of his counsel's explanation for abandoning the Boiter motion, and the prosecutor noted Makins failed to offer any evidence the allegations were false.

Makins cites several cases purportedly in support of his argument. In State v. LeClair, 730 P.2d 609, 615 (Or. Ct. App. 1987), the Oregon Court of Appeals found in order for alleged prior false accusations to be admitted, there must be evidence the victim recanted the accusations, the defendant demonstrates the accusations were false, or evidence demonstrates the accusations were false. Further, the defendant may be excluded from attempting to elicit such testimony if the probative value, including the probability that false accusations were made, is outweighed by the risk of prejudice. Id. The Oregon court concluded two incidents, a 1981 incident and a 1984 incident,

were properly excluded. The victim denied making a 1981 accusation. The victim maintained the 1984 incident did occur, while the alleged perpetrator denied the incident occurred. The Oregon court concluded the trial court properly applied the balancing test to preclude the defense from inquiring about either incident. Id. at 615-16. In the instant case, evidence of abuse by the three children was not admissible because Makins failed to demonstrate the accusations were false.

Makins relies on two other cases which lack applicability to the instant case. In State v. Baron, 292 S.E.2d 741, 744 (N.C. Ct. App. 1982), the North Carolina Court of Appeals did not determine the standard of admissibility for alleged false accusations, but instead determined false accusations did not fall under the state's rape shield statute. Likewise, in Smith v. State, 377 S.E.2d 158, 159-60 (Ga. 1989), the Georgia Supreme Court found the trial court erred by finding alleged false accusations by the victim inadmissible under the rape shield statute and concluded the rape-shield law does not prohibit such testimony. The Georgia Supreme Court set out the rule that the trial court must make a threshold determination that a reasonable probability of falsity exists to protect the prosecutrix from unfounded allegations that she made similar allegations in the past. Id. at 138. Ultimately Makins' reliance on these cases is misplaced, because unlike those cases, the trial court in the instant case did not base its ruling on the rape shield statute, but instead on Boiter.

Makins also cites State v. Long, 140 S.W.3d 27 (Mo. 2004). However, the Missouri Supreme Court held exactly what Makins complains about: the Missouri Court found that a defendant seeking to admit evidence that a prosecuting witness made a previous false allegation **must show** by a preponderance of evidence that the accusation previously made was actually false. Id. at 32.

In State v. Miller, 921 A.2d 942, 946-47 (N.H. 2007), the New Hampshire Supreme Court made a distinction between a threshold showing allowing cross-examination of a victim about an alleged false accusation, and a higher **clear and convincing** standard to allow extrinsic evidence of a prior false accusation. Since Makins abandoned his motion, it is difficult first to know whether Makins was merely seeking to cross-examine Victim or offer extrinsic evidence. However, there is no indication from the record Makins would have met the lower threshold requirement since she confirmed the abuse actually occurred. Further, Makins was not prejudiced since cross-examination would not have aided Makins. Finally, Miller actually requires a higher standard for admitting extrinsic evidence of a purported false allegation, which the State would suggest is excellent policy because of the danger of unfair prejudice from unfounded claims of a false allegation.

Likewise, in Commonwealth v. Bohannon, 378 N.E.2d 987 (Mass. 1978), the Massachusetts Supreme Court addressed only the question of whether cross-examination about prior false accusations was permissible, without addressing the admissibility of extrinsic evidence. Unlike the present case, an offer of proof was made – the defendant established the complainant made false accusations through hospital records. Id. at 93, 95. Indeed, since Bohannon, the Appeals Court of Massachusetts subsequently held a defendant is not always permitted to cross-examine a victim about alleged false accusations, noting Bohannon merely stands for "the proposition that the general rule barring evidence of prior false accusations is 'not inflexible.'" Commonwealth v. Trenholm, 442 N.E.2d 745, 746 (Mass. App. Ct. 1982). In Commonwealth v. Haynes, 696 N.E.2d 555, 559-60 (Mass. App. Ct. 1998), the Appeals Court noted a requirement of "special circumstances" to allow a victim to be cross-examined about an alleged false accusation and upheld the trial court

determination that the testimony was inadmissible because there was no factual basis from independent third party records. Accordingly, Massachusetts does not have the permissive rule Makins advocates in his brief.

In the instant case, the trial court did not err in declining to admit the proposed evidence in the absence of a showing of proof. "The relevance, materiality, and admissibility of evidence are matters within the sound discretion of the trial court and a ruling will be disturbed only upon a showing of an abuse of discretion." State v. Shuler, 353 S.C. 176, 184, 577 S.E.2d 438, 442 (2003). The only evidence in the record was the allegations were true. Further, by aborting the hearing, defense counsel prevented the trial court from conducting a balancing test to determine admissibility. Accordingly, the issue should not be reviewed and the trial court did not abuse its discretion.

II.

The trial court did not err in denying Appellant's motion for mistrial. The State's expert witness did not impermissibly bolster Victim's testimony by providing testimony on the behaviors of sexually abused children and the symptoms of trauma. The issue is not preserved for review since Appellant did not contemporaneously object to the sufficiency of the "curative" instruction.

Makins alleges Victim's counselor, Kristen Rich, bolstered Victim's testimony. Rich provided the jury general background information on trauma and the behaviors of sexually abused children. Additionally, Rich testified she treated Victim and Victim disclosed sexual abuse. However, Rich did not testify about any symptoms of trauma Victim might have suffered or provide a diagnosis. She did not comment on Victim's credibility. Makins blindly ignores this Court's precedent from State v. Barrett, 416 S.C. 124, 785 S.E.2d 387 (Ct. App. 2016).

At trial, Makins made a motion for mistrial, alleging Rich's testimony bolstered Victim's testimony. The trial court declined to grant a mistrial, finding the prosecution did not elicit any improper testimony. Makins renewed the motion after the State rested its case. The trial court offered a curative instruction. Tr. pp. 338-40. During the trial court's instructions to the jury, the trial court advised the jury, "[U]nderstand that no witness, even an expert witness, can vouch for the credibility of another witness' testimony." Tr. p. 399, lines 11-13. Following instructions, not only did Makins not make any exceptions to the instructions to the jury, Makins did not challenge or object to the sufficiency of the "curative" instruction. Tr. p. 409, lines 18-23. Only **after** the jury began deliberating did Makins object to the sufficiency of the curative instruction. Tr. p. 415, lines 5-9.

"Our law is clear that a party must make a contemporaneous objection that is ruled upon by the trial judge to preserve an issue for appellate review." State v. Sheppard, 391 S.C. 415, 420-21, 706 S.E.2d 16, 19 (2011). "A **contemporaneous** objection to the sufficiency of a curative charge must be made to preserve the issue for appellate review." State v. Greene, 330 S.C. 551, 5561, 499 S.E.2d 817, 822 (Ct. App. 1997) (emphasis added). Because counsel failed to object to the sufficiency of the curative instruction, the issue is not preserved for review. Makins neglects to discuss the limiting instruction in his brief and did not designate the jury instruction or Makins' belated objection to the sufficiency of the instruction.

Further, Rich's testimony was proper expert testimony and did not improperly bolster Victim's testimony. In South Carolina, "[t]he admission or exclusion of expert testimony is a matter within the sound discretion of the trial court." Burroughs v. Worsham, 352 S.C. 382, 390, 574 S.E.2d 215, 219 (Ct. App. 2002). "A trial court's decision to admit or exclude expert testimony will not be reversed absent a prejudicial abuse of discretion." State v. White, 382 S.C. 265, 269, 676 S.E.2d 684, 686 (2009). A trial court abuses its power of discretion when it commits an error of law or when there has been a factual conclusion without any evidentiary support. State v. Price, 368 S.C. 494, 498, 629 S.E.2d 363, 365 (2006).

Expert testimony concerning trauma resulting from sexual abuse is admissible. "[B]oth expert testimony and behavioral evidence are admissible as rape trauma evidence to prove a sexual offense occurred where the probative value of such evidence outweighs its prejudicial effect." State v. Schumpert, 312 S.C. 502, 506, 435 S.E.2d 859, 862 (1993). "Expert testimony on rape trauma may be more crucial in situations where children are victims. The inexperience and

impressionability of children often render them unable to effectively articulate the events giving rise to criminal sexual behavior." State v. White, 361 S.C. 407, 414-15, 605 S.E.2d 540, 544 (2004) (finding testimony is admissible in prosecutions where the victim of sexual abuse is an adult).

Rich explained the term trauma as follows:

> [T]rauma is a very bad event where somebody feels like they might be hurt or killed or something very bad might happen to them. And generally, it's shocking in nature where somebody feels helpless or terrorized or horrified, and if that occurs to them. So something out of the ordinary that's bad. It's worse than falling down and skinning your knee. It's something that radically shifts your life.

Tr. p. 293, lines 11-20. Rich gave the following examples of events which could result in trauma: car accidents, witnessing domestic violence, physical abuse, sexual abuse, witnessing the death of a loved one that's traumatic or violent, robberies, kidnappings, or house fires. Tr. p. 293, line 23 – p. 294, line 5. Rich noted it was important during therapy for the patient to talk about the traumatic events the patient experienced. Tr. p. 294.

Rich was then qualified as an expert in treatment of child trauma and child abuse dynamics. Tr. pp. 299-300. Rich further explained a child experiencing trauma often will show some avoidance by not wanting to be around the setting of the trauma or "a person that reminds them of the trauma." Tr. p. 301, lines 6-11. Traumatized children may also become hypervigilant out of fear the traumatic event will happen again. Tr. p. 301, lines 12-15. They may have difficulty sleeping and suffer nightmares. Tr. p. 301, lines 16-20. The children may act out at school or home, and suffer emotional difficulties. Tr. p. 301, lines 21-25. The trauma may manifest itself in somatic symptoms, intrusive thoughts, or mood disturbances. Tr. p. 302, lines 1-13.

The prosecutor asked Rich about whether any symptoms the child may experience are

particular to sexual abuse trauma. Rich explained:

> So sexual abuse trauma is strongly correlated with that. It's sometimes, you know, bedwetting, pulling out hair, wanting to avoid particular situations, being frightened or being in certain situations.
>
> Sometimes children who have been abused by a particular type of perpetrator, they want to avoid that. So avoid – some children want to avoid men. Some children want to avoid certain situations.

Tr. p. 302, line 17 – p. 303, line 1. Note in the instant case, no testimony was elicited that Victim pulled her hair out, suffered nightmares, suffered intrusive thoughts, was frightened, or avoided men generally. Therefore, Makins claim that Rich testified only to the symptoms Victim suffered is incorrect.

Rich explained trauma associated with sexual abuse tends to be more situational. The secretive and seductive nature of child sexual abuse creates a traumatic situation different than, for example, a car accident. Because the abuse occurring in the context of a personal relationship violates that relationship, the child will feel shame, fear, insecurity, or guilt, and display these feelings as symptoms of the trauma resulting from the abuse. Tr. p. 303, lines 5-20.

Rich explained about delayed disclosure. Delayed disclosure often occurs because the abuser threatens the child or the child's family. The child may also fear the child will be in trouble if the child discloses the abuse or may fear the abuser will be in trouble. The child is more likely to delay disclosure when the abuser is a family member. The child will often delay disclosure until they feel safe. Tr. p. 304.

Disclosure tends to be piecemeal: Rich described disclosure as a process rather than an event. The child may disclose a fraction of the abuse to test the non-offending parent or may disclose only what is bothering them the most at the moment. The child will often disclose more as they become

more comfortable or feel safer, further disclosure may be dependent on whether the child is believed. Tr. p. 305. The child may want to push aside recollections of the abuse or may "close up because they don't want to hurt the adults in their life." Tr. p. 306, lines 8-17.

Rich explained sometimes children experience difficulty discussing the abuse they experienced, so counselors may let the child draw what happened to them. Tr. p. 306, line 21 – p. 307, line 6. When the prosecution began to ask about the therapy Rich provided to Victim, defense counsel interposed the first objection to the testimony, pretrial or before the jury. Once the jury was out, defense counsel moved for a mistrial. Tr. pp. 307-09. Strangely, defense counsel claimed the reason he waited to interpose the objection was because he wanted to be sure the witness treated the child. Tr. p. 309, lines 5-11. In fact, during the in limine motion, the prosecutor informed counsel and the trial court that Rich would testify about "some details of her treatment of this victim." Tr. p. 96, lines 15-22.

Defense counsel's objection was not timely: defense counsel belatedly complained that Rich testified of the five hundred patients she treated, about 120 to 150 were treated for trauma related to sexual abuse. Tr. p. 309, lines 18-23. Defense counsel claimed Rich's testimony conveyed she believes the child because she is saying to the jury she would not have treated the child if the child was not suffering trauma. Tr. pp. 310-11. The prosecution noted at that point in Rich's testimony, the testimony was the equivalent of "blind expert" testimony and Rich did not testify she believed the victim. The prosecutor made clear she was not eliciting testimony from Rich as to what symptoms Victim suffered. Tr. p. 311. Defense counsel's reply was to complain that Rich's expert testimony was supported by fact witness testimony from other witnesses like Victim's mother, who

would testify to Victim's demeanor and symptoms. Tr. pp. 312-13. However, defense counsel did not explain how that is different from cases where a blind expert testifies generally about symptoms of child abuse that corroborates another witness's fact testimony.

The trial court denied the mistrial motion. Tr. p. 320. The trial court then returned from a brief recess and announced it would limit the State's inquiry into Rich's specific treatment and diagnosis. Tr. pp. 321-22. Defense counsel made no objection at that time to the trial court's ruling or the sufficiency of its limitation on Rich's testimony. Tr. p. 323-24. See State v Beckham, 334 S.C. 302, 513 S.E.2d 606 (1999) (where appellant objects, but fails to request further relief or object to the court's failure to give a curative instruction, no issue is preserved for review).

After the jury returned to the courtroom, Rich testified she provided treatment to Victim, and Victim disclosed sexual abuse during a therapy session. Tr. p. 325. Victim also drew a picture, admitted as an exhibit. Rich laid foundation for the exhibit and testified to Victim's explanation of the drawing. Defense counsel did not object to the exhibit or any of the testimony surrounding it. Tr. pp. 325-29. She testified Victim disclosed the abuse occurred between the time she was five years old and seven or eight years old, and the abuse always occurred at Toi's house. Tr. p. 330. At no point did Rich testify Victim suffered from any symptoms of trauma, nor did Rich offer any testimony implying she believed Victim's disclosures. Further, contrary to Makins' assertions in his brief, Rich did not testify that she diagnosed Victim with post-traumatic stress syndrome.

Makins also falsely claims, "Rich testified that she **only** works with children who have experienced some kind of trauma and that she had 'provided therapy to the victim in this case.' Tr. p. 307, ll. 6-9." Appellant's Br. p. 25 (emphasis added). The passage found at lines six through nine

on page 307 is actually the prosecutor's question posed to Rich, "I want to move a little more specifically. Have you provided therapy to the victim in this case, [Victim's name]?" The answer was yes, followed by defense counsel's objection. Tr. p. 307, lines 6-9. Further, Rich testified she provides individual and family therapy, and occasionally group therapy, in her current position. When asked if she specialized in any particular type of therapy, she replied she has "different types" before noting she was certified to administer trauma focused cognitive behavioral therapy. Tr. p. 292, line 24- p. 293, line 8. Rich never testified she treats **only** traumatized children although her credentials as an expert in trauma were impressive. Also, she certainly did not testify she only treats children if they suffered trauma, as defense counsel suggested to the trial court. Bowers v. Bowers, 304 S.C. 65, 68, 403 S.E.2d 127, 129 (Ct. App. 1991) ("Arguments of counsel are . . . not evidence."). Pretrial, asked if she focused "on any particular type of issues with children." Rich replied, "Really, it's based on what they present and what they have. Many, many of the children that I work with had a history of trauma and I do – I am qualified to provide trauma [therapy] for them." Tr. p. 75, line 20 – p. 76, line 1. Many is not all, and Makins' brief is incorrect on this point.

Makins relies on cases in which a forensic interviewer testified about a victim's credibility or veracity. For instance, in State v. McKerley, 297 S.C. 461, 466, 725 S.E.2d 139, 142 (Ct. App. 2012), the forensic interviewer offered the conclusion that victim's interviews were compelling for sexual abuse. In State v. Jennings, 394 S.C. 473, 476-81, 716 S.E.2d 91, 92-95 (2011), the forensic interviewer's report from interviews with three victims was admitted into evidence, each report concluded there was a compelling disclosure of abuse.

The prosecution cited State v. Brown, 411 S.C. 332, 768 S.E.2d 246, 252-53 (Ct. App. 2015).

In Brown, an expert witness who did not interview the victim provided testimony on the behaviors of sexually abused children. This Court distinguished McKerley and Jennings, plus similar cases the appellant relied upon, noting that unlike those cases the expert: (1) did not testify as a forensic interviewer, (2) never interviewed the victims, (3) did not prepare a report of the interview, (4) did not express any opinion regarding the credibility of the allegations, and (5) did not express an opinion regarding the child victims. Id. at 344-45, 768 S.E.2d at 252-53. The same holds true in this case: although Rich did provide counseling for Victim, she did not conduct a forensic interview, and certainly none of the other four circumstances exist in the instant case. Ultimately, the Brown court found the expert's testimony, which merely provided broad testimony about the behaviors of sexually abused children, did not bolster the victims' testimony even though the expert's testimony did corroborate some of the reasons for the victims' delayed disclosure. Id. at 345, 768 S.E.2d at 253.

Makins also argues Rich should not have provided expert testimony because she was aware of Victim's disclosure history and Victim made a disclosure directly to her. Makins neglects to cite State v. Barrett, 416 S.C. 124, 785 S.E.2d 387 (Ct. App. 2016), in which this Court rejected arguments that the trial court should not have allowed the person who conducted a forensic interview of the victim to be qualified as an expert in child abuse characteristics and provide testimony on the behaviors of sexually abused children. This Court found it was not an error to admit the interviewer as an expert, the testimony she offered regarding general behavioral characteristics was admissible, and she did not improperly vouch for the victim's credibility. Id. at 130, 785 S.E.2d at 389.

In the instant case, Rich testified about trauma and delayed disclosure. She testified she

provided counseling to Victim, and Victim disclosed abuse. But Rich did not offer an opinion on Victim's veracity or even what symptoms, if any, Rich might have observed while treating Victim. In the instant case, because Rich offered admissible testimony about general behavior characteristics of abused children and did not vouch for the victim's credibility, the trial court did not err in **further** limiting her testimony.

The improper admission of evidence is reversible error only when the admission causes prejudice. State v. Mitchell, 286 S.C. 572, 573, 336 S.E.2d 150, 151 (1985). "Unfair prejudice means an undue tendency to suggest a decision on an improper basis." State v. Owens, 346 S.C. 637, 552 S.E.2d 745 (2001) *overruled on other grounds by* State v. Gentry, 363 S.C. 93, 610 S.E.2d 494 (2005). "Unfair prejudice does not mean the damage to a defendant's case that results from the legitimate probative force of the evidence; rather it refers to evidence which tends to suggest decision on an improper basis." State v. Dennis, 402 S.C. 627, 636, 742 S.E.2d 21, 26 (Ct. App. 2013) (internal quotation marks omitted). "All evidence is meant to be prejudicial; it is only unfair prejudice which must be avoided." State v. Gilchrist, 329 S.C. 621, 630, 496 S.E.2d 424, 429 (Ct. App. 1998) (internal quotation marks omitted).

In the instant case, Makins mistakes the legitimate probative value of behavioral expert testimony for prejudice. The evidence presented did not create a danger of unfair prejudice. Further, in light of the evidence at trial, any error was harmless beyond a reasonable doubt. Mitchell, 286 S.C. at 573, 336 S.E.2d at 151 (1985) (holding whether an error is harmless depends on the circumstances of the case, but it is harmless where it could not reasonably have changed the outcome of the trial).

CONCLUSION

For all of the foregoing reasons, the judgment and conviction of the lower court should be affirmed.

Respectfully submitted,

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ATTORNEYS FOR RESPONDENT

January 22, 2018

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal From Greenville County
The Honorable Robin B. Stilwell, Circuit Court Judge

Appellate Case No: 2016-002495

THE STATE,

Respondent,

v.

ONTARIO STEFON PATRICK MAKINS,

Appellant.

PROOF OF SERVICE

I, Anne Mueller, certify that I have served the within Initial Brief of Respondent and Dersignation of Matter on Appellant by delivering two copies of the same to Taylor D. Gilliam, Esquire, S.C. Commission on Indigent Defense, Division of Appellate Defense, Post Office Box 11589, Columbia, South Carolina 29211-1589.

I further certify that all parties required by Rule to be served have been served.
This 22nd day of January, 2018.

Anne Mueller

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Legal Assistant

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ALAN WILSON
ATTORNEY GENERAL

January 22, 2018

The Honorable Jenny Abbott Kitchings
Clerk of Court, South Carolina Court of Appeals
P.O. Box 11629
Columbia, SC 29201

Re: The State v. Ontarion Stefon Patrick Makins
Appellate Case No: 2016-002495

Dear Ms. Kitchings:

Enclosed please find an original and one (1) copy of the State's Initial Brief of Respondent and Designation of Matter, including proof of service, in the above-referenced case.

Sincerely,

David Spencer
Senior Assistant Attorney General
S.C. Bar No: 68571

DS/aam
Enclosures

cc: Taylor D. Gilliam (with two copies)
Victim Advocacy Division